

FEB 14 1967
No. 20591/

United States Court of Appeals

FOR THE NINTH CIRCUIT.

REDERI A/B SOYA, as owners of the Swedish Motor Vessel
OTELLO,

Appellant,

vs.

The SS. *GRAND GRACE*, her Engines, etc., and her Owners,
GRACE NAVIGATION CORPORATION,

and

The MV *JANE STOVE*, her Engines, etc., and her Owners,
LORENTZENS SKIBS A/B,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE
DISTRICT OF OREGON, HONORABLE JOHN F. KILKENNY,
DISTRICT JUDGE.

APPELLANT'S BRIEF.

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FILED

APR 1 1966

WM. B. LUCK, CLERK

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
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APPELLANT'S BRIEF.

Jurisdiction.

This case arises under the admiralty and maritime jurisdiction of the United States and the Appellate Jurisdiction of this Court. (U. S. Constitution, Art. III §2; 28 USCA §1333, 28 USCA §1291.) On September 10, 1965, the owners of the M/V *Otello* duly filed a timely notice of appeal (R. 131), from a final decision and decree by District Judge Kilkenney in this matter in the District Court for the District of Oregon (R. 124).

Statement.

This case involves a collision between the Swedish M/V *Otello* and the Liberian SS. *Grand Grace* which occurred on January 19, 1964 in the Columbia River near Astoria during a gale force wind. A third vessel, the Norwegian M/V *Jane Stove* has been charged by both colliding vessels with interfering with the navigation of the *Otello*, thereby contributing to the collision.

Statement of facts.

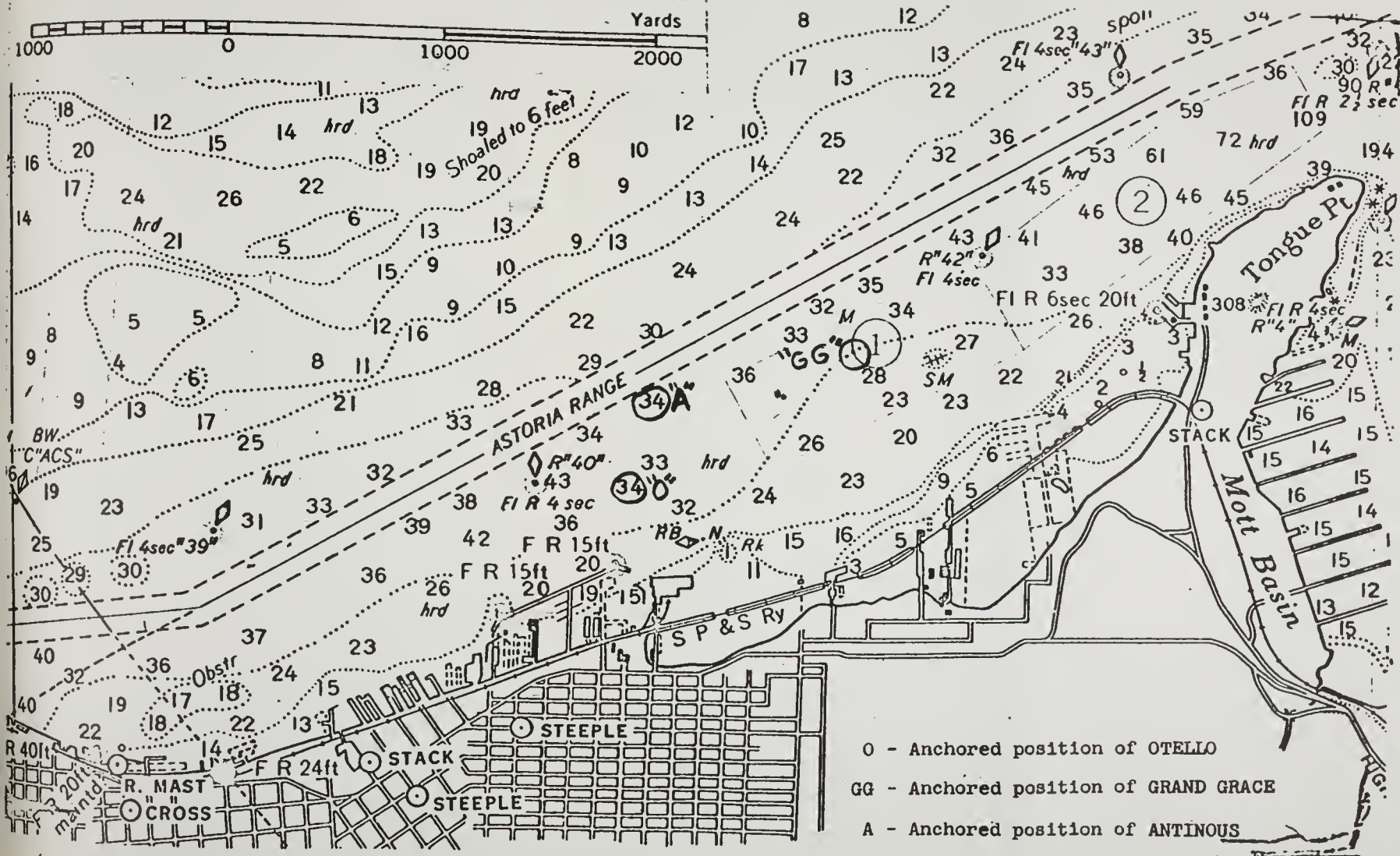
On January 17, 1964, the *Otello* anchored off Astoria, south of the main ship channel, in a location about midway between buoy 40 and the red and black nun buoy to the southeast (R. 340). The *Otello* had anchored in this position with five shackles of chain (450 feet) on her port anchor, in accordance with the local pilot's recommendations (R. 331). The *Otello's* anchor bearings were checked carefully on every watch (R. 344-345, 475, 524).

On the attached page is a photocopy of the pertinent harbor area, showing the stated anchored position of the *Otello*, marked with the letter "O".

On the morning of January 19, 1964, the *Mary Olsen*, a lumber barge, came to anchor about three hundred feet off the *Otello's* port quarter (R. 487). The American cargo vessel, *Antinous*, anchored about five hundred feet northward and slightly further upstream on the *Otello's* starboard side and south of the main ship channel (R. 487). The *Grand Grace*, which ultimately was in collision with the *Otello*, was anchored about one-quarter to one-half mile astern of the *Otello* (R. 487).

The stated position of the *Grand Grace* is shown on the photocopy above mentioned, by the letters "GG".

Weather reports received by the *Otello* for January 19 predicted that there would be winds from 35 to 50 knots (Ex. 8C). At 2:00 p.m. the officers aboard the *Otello* noted that the wind was westerly force nine to twelve, and at 3:00 p.m. the wind had increased to force 10 to 12, from the same direction (Ex. 4D). According to the official





Beaufort scale, wind force 9 consists of winds of 41 to 47 knots, and force 12 consists of winds over 65 knots. An alert watch was maintained aboard the *Otello* during this period to check her position.

At about 2:30 p.m. the *Otello's* Master and Third Mate observed that the *Otello* was moving closer to the barge *Mary Olsen*, and it was determined that the *Otello* was dragging (R. 166-167). The *Otello* immediately began sounding her whistle for a pilot, so that she could be moved to a new anchorage position (R. 166-168). Shortly thereafter the *Otello's* engines were ordered on "stand-by" (R. 677). Being a motor vessel, the *Otello* could put her engines to use immediately if required (R. 683).

After futilely waiting about fifteen minutes for a pilot, the *Otello* commenced maneuvering her twin engines in an effort to maintain her position (R. 677-678), and the Mate and Carpenter, who had previously been ordered to report to the bow, were ordered to commence heaving up the anchor (R. 202-203). It was intended to move forward, pick up the anchor, move back to or beyond the original anchored position, and then let go both anchors (R. 176). Prior to this time, there had been no need for the *Otello* to use both anchors. After she started dragging, such an action would have been ineffective unless and until the *Otello* was able to **move ahead** by her engine power back to her original anchored position, where the second anchor could then have been put out (R. 242).

After the *Otello*, assisted by her engines, had heaved in about two shackles of chain (180 feet), the chain caught across her sharp bow, thus preventing the crew from heaving in any more chain. The wind swung the *Otello's* bow to starboard and she began dragging in an easterly direction upstream with her portside exposed to the westerly wind (R. 178). Efforts to head the *Otello* into the wind by the use of her engines and helm were futile (R. 206). As the *Otello* dragged past the *Autinous*, her master decided he would work the *Otello's* engines ahead and steam northward, to the open water north of the main channel, once the *Otello* had cleared the *Autinous* (R. 179). At this point,

the M/V *Jane Stove* was observed approaching, at high speed, on a course between the *Antinous* and the *Otello* (R. 179-184). The *Otello* stopped sounding pilot signals and commenced sounding danger signals (R. 179-180).

The *Jane Stove* disregarded the *Otello's* danger signals and proceeded through the anchorage, across the bow of the *Otello*, at an undiminished speed (R. 185). The *Jane Stove's* negligent action forced the *Otello* to stop her engines and then go astern, to avoid a collision with the *Jane Stove* (R. 221, 222, 247). This maneuver prevented the *Otello* from proceeding into the open waters north of the main channel and placed her at the mercy of the wind, which was setting her down on the *Grand Grace* (R. 198, 199).

The officers of the *Grand Grace* had observed the predicament of the *Otello* from the beginning (nearly an hour before), but made no effort whatsoever to avoid the collision between the two vessels (R. 837-838, 1182-1183, 843). The *Grand Grace* made no use of her rudder to sheer the vessel away from the *Otello* (R. 843), as the nearby *Antinous* successfully did (R. 1647), nor did the *Grand Grace* pay out more anchor chain (R. 842), either of which would have avoided the collision. Nor did the *Grand Grace* make any effort to ready her engines to aid her in maneuvering out of the way (R. 843).

Finally, at about 3:23 P. M., the after starboard side of the *Otello*, just after the *Jane Stove* cleared the *Otello's* bow, came into contact with the bow of the *Grand Grace*, at an angle of about 90 degrees (App. A p. 31). As a result of the collision, the *Otello* suffered damages in the amount of \$96,933.13.

The proceedings.

On January 22, 1964, Rederi Soya, as owner of the *Otello*, filed a libel in the District Court for the District of Oregon naming the SS. *Grand Grace* and her owners and the M/V *Jane Stove* and her owners as respondents, alleging that the negligence of these vessels caused damage

to the *Otello* (R. 1). On January 23, 1964, the owners of the *Grand Grace* filed an answer and cross libel against the *Otello* and *Jane Stove*, charging that both vessels negligently caused damage to the *Grand Grace* (R. 6). On March 23, 1964, the owners of the *Jane Stove* filed an answer denying the allegations of fault made by the other vessels against the *Jane Stove* (R. 35).

The consolidated suits were heard by the District Court of Oregon, which rendered a memorandum decision (R. 73), dismissing with prejudice the libel of the owners of the *Otello* against the *Grand Grace* and *Jane Stove*, and holding the owners of the *Otello* liable to the owners of the *Grand Grace* for the damages alleged in the *Grand Grace* cross libel. On January 5, 1965, Judge Kilkenny signed proposed findings of fact and conclusions of law submitted by the proctors for the M/V *Jane Stove* and the SS. *Grand Grace* (R. 75). On July 19, 1965, the Court rendered a final decree in this matter (R. 124-126), wherein it awarded to the owners of the *Grand Grace* damages for injury to the *Grand Grace*, plus interest, taxable costs and "litigation expenses". The owners of the *Jane Stove* were awarded "litigation expenses", interest and taxable costs. On the same date, the owners of the *Otello* filed a notice of appeal from this decision (R. 131-132).

Errors.

Appellant submits that the trial court erred in the following respects:

1. The Trial Court ignored the deposition testimony of the *Jane Stove's* officers and crew, showing that she boxed in the *Otello* and interfered with her navigation which refuted the claims of the *Jane Stove's* self-interested pilot.

2. The Trial Court overlooked the fact that the *Grand Grace's* testimony, all taken by deposition, admitted that her officers did nothing to prevent the

collision, although aware of the *Otello's* predicament for a considerable period of time before the collision.

3. The Trial Court's ultimate liability conclusion is contrary to the testimony describing the collision contained almost entirely in the approximately 40 depositions of ship's witnesses introduced in evidence.

4. None of the depositions, constituting virtually all of the testimony, nor the many exhibits were read to or described to the Trial Court, at his suggestion and upon his assurance that he would study them carefully, which apparently was not done.

5. The Trial Court ignored the fact that the *Otello's* dragging was caused solely by sudden and extremely high winds.

6. The Trial Court erred in failing to draw the necessary adverse inferences from the *Grand Grace's* failure to produce her Master or Pilot at the trial, or to take their *de bene esse* depositions.

7. The Trial Court's opinion did not comply with the letter or spirit of the Supreme Court Admiralty Rule 46½ in that it contained no analysis of the facts or law, gave no reasons, and stated only ultimate conclusions.

8. The Trial Court merely "rubber stamped" findings of fact and conclusions of law jointly submitted by proctors for the *Grand Grace* and the *Jane Stove*, more than two months after the opinion was filed, without affording appellant the prior opportunity to review them or to submit counter proposals.

9. The Trial Court erred in allowing litigation expenses.

Argument.

Summary.

It is to be noted at the outset that the Trial Court failed to comply with the dictates of the Supreme Court Admiralty Rule 46½ in rendering its decision. The requirement that a court "find the facts specially and state separately its conclusions of law thereon" is to be followed if a court is to make a decision vested with due process. The underlying harm to a litigant which inevitably stems from a disregard of this rule is clearly present in this case.

The fact that the lower Court adopted the prevailing parties' proposed findings of fact and conclusions of law *in toto* raises doubts that these findings were independently determined by the Court in arriving at its decision. It is consistently held that an appellate Court will scrutinize such findings very closely. *Infra*, Point I, p. 8 *et seq.*

The basic issues involved in this case were whether or not any or all of the vessels named as parties were negligent. We submit that the lower Court's finding of negligence by the *Otello* and lack of negligence by either the *Grand Grace* or *Jane Stove* is erroneous. The lower Court failed to find facts justifying a conclusion of fault on the part of the *Otello* or its absence in the case of the *Grand Grace* and the *Jane Stove*.

We submit that the trial Court's findings of facts 15 through 23 are clearly erroneous because they totally ignore the deposition testimony of the Master and watch officer of the *Jane Stove* and the Master and Watch Officer of the *Grand Grace*. Furthermore, the Court failed to draw any adverse inferences from the non-production of either the Master or the Pilot of the *Grand Grace* for either *de bene esse* depositions or trial testimony. This case is based mainly on depositions rather than trial testimony, which leaves this Court in as good a position to determine the issues as the trial Court.

In its final decree, the lower Court awarded the prevailing parties "litigation expenses". We submit that such award is totally at odds with American jurisprudence, and insupportable in either law or fact.

POINT I.

The trial court did not comply with Supreme Court Admiralty Rule 46½ in rendering its decision (specification of errors 7 and 8 above).

Supreme Court Admiralty Rule 46½:

“In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49. Added June 2, 1930, eff. October 1, 1930.”

Decisions condemn certain courts' practices of simply “parroting” findings of fact and conclusions of law submitted by the prevailing party as being violative of Rule 46½.

In *The Severance*, 152 F. 2d 916, 918 (4th Cir. 1945), a steamship under tow collided with a barge piling. Suits were brought by the vessel's owner and cargo against the tug, and judgment was rendered for the respondent tug. The judge did not file an opinion, but simply advised the parties by mail that he found no fault by the respondent tug. The trial judge then adopted, virtually *in toto*, the proposed findings and conclusions of law submitted by the respondent tug. The Circuit Court reversed and remanded. Circuit Judge Dobie stated at p. 918:

“No opinion was filed by the District Judge, who wrote to the proctor for respondents that the District Judge found the respondents without fault and therefore relieved of liability. In this letter the District Judge requested the proctor for respondents to present findings of fact and conclusions of law. The District Judge then, practically *in toto*, adopted these findings and conclusions.

“1 This practice is not to be commended. It has been condemned by many courts as not living

up to the provision of Admiralty Rule 46½, 28 U. S. C. A. following section 723: 'In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon.' See *Irvine v. The Hesper*, 122 U. S. 256, 7 S. Ct. 1177, 30 L. Ed. 1175; *Petterson v. New York Central R. Co.*, 2 Cir., 126 F. 2d 992; *Schilling v. Schwitzer*, 79 U. S. App. D. C. 20, 142 F. 2d 82; *City of New York v. McLain Lines*, 2 Cir., 147 F. 2d 393; *Chicago, D. & G. B. Transit Co. v. Moore*, 6 Cir. 259 F. 490."

The lower Court's memorandum decision, and subsequent findings of fact and conclusions of law are clearly neither within the letter nor the spirit of Supreme Court Admiralty Rule 46½. The memorandum decision, in essence, simply states the broad conclusions that the owners of the *Otello* had failed to sustain their burden of proof, whereas the owners of the *Grand Grace* had met their burden of proof as to certain contentions enumerated in their pre-trial order. We submit that the Court failed to "find the facts specially and state separately its conclusions of law thereon", but simply made a general statement as to liability without any specification of facts in support of his conclusions.

A decision, such as here, based upon findings of fact and conclusions of law submitted by the prevailing party, is not entitled to the same weight and dignity which an independent and unfettered judgment would receive on appeal. In *The Severance*, *supra*, Judge Dobie stated at page 918:

"* * * We content ourselves by observing that these findings of fact and conclusions of law are not, at our hands, entitled to the same weight and dignity which they would have possessed had they represented the unfettered and independent judgment of the trial court."

In *Mesle v. Kea Steamship Corporation*, 260 F. 2d 747, 750 (3d Cir. 1958), *cert. denied*, 359 U. S. 966, Circuit Judge McLaughlin states at page 750:

“* * * And yet where the court has not independently set out its findings we think the reviewing court may more readily be * * * ‘left with a definite and firm conviction that a mistake has been committed’ ”. (Citation omitted.)

Circuit Judge Rives stated in *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 259 F. 2d 398, 401 (5th Cir. 1958), *cert. denied*, 361 U. S. 930, at p. 401 as follows:

“* * * Nevertheless, we must say that findings and conclusions which represent the independent judicial labors and study of the district judge are more helpful to this court.”

Circuit Judge Wisdom stated in *Louis Dryfus and Cie v. Panama Canal Co.*, 298 F. 2d 733, 737, 738, 739 (5th Cir. 1962), at page 738, as follows:

“When the findings have been drafted by the trial judge himself, they carry a certain badge of personal analysis and determination that may dissuade an appellate court from reversing in a doubtful case. When that badge is missing, the appellate court can feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered—if the evidence supporting the decision is of a doubtful nature.”

We submit that in the present case the lower Court simply adopted the self-serving, slanted findings of fact and conclusions of law submitted by the prevailing parties. The failure to show any clear and independent analysis of the facts and law in this case raises serious doubts as to the soundness of the decision. We submit further that the circumstances warrant scrutiny by this Court of the case, to prevent substantial injustice resulting from the failure of the Trial Judge to render an independent and unfettered judgment.

POINT II.

The trial court's findings of fact as to the *Otello* and the vessels she charges are clearly erroneous (specification of errors 1 through 6).

The errors with respect to the *Otello*.

In judging whether a particular action was negligent, a court should naturally view the facts and fix responsibility in the light of the circumstances confronting the parties at the time. Cf. *Petterson v. New York Central R. Co.*, 126 F. 2d 992, 994 (2d Cir. 1942); the *Queen Elizabeth*, 122 F. 406, 409 (2d Cir. 1903). When thus viewed, if it appears that a navigator acted within the limits of reasonable discretion, his action should not be condemned, even though, in the light of knowledge after the event, it appears that he might have chosen a more successful course. The *Queen Elizabeth*, *supra*; the *Clarence L. Blakeslee*, 243 F. 365 366 (2d Cir. 1917); the *Hugh Kylees*, 73 Fed. 255, 259 (2d Cir. 1896). We submit that the lower Court applied at best superficial considerations to the actions of the *Otello*, without regard for the realities which confronted her throughout. If the actions of the *Otello* are judged on a proper basis, her actions cannot be condemned.

The *Otello* had been safely and securely anchored on one anchor for two days prior to the collision (R. 164-166). There was no prior warning that the winds which ultimately caused the *Otello* to drag would be of such great intensity (Ex. 8C). Had the *Otello* let out more chain when she discovered she was dragging, she would have placed herself in dangerously close proximity of the lumber barge, the *Mary Olsen* (R. 242). Once she began to drag her first anchor, it was futile to let go a second anchor, since this would still have left her perilously close to the *Mary Olsen* (R. 242). The *Otello* began dragging without warning, thus there was no apparent need to ease the strain on the anchor chain prior to her dragging. Once it was observed that the *Otello* was dragging,

her twin engines were used to ease the strain on her anchor chain (R. 204). The Court below, according to Finding of Fact 16(l) would have had the *Otello* remain quiescent, dragging helplessly toward the *Grand Grace*, rather than attempt to navigate out of the crowded anchorage to the relative safety of the open waters to the north of the main channel.

Finding of Fact 16(g) ignores the uncontroverted fact that the *Otello* was overcoming her gale-induced dragging predicament and was in fact navigating effectively out of the anchorage into the fairway, but was prevented because the *Jane Stove* heedlessly "crowded" and blocked her (R. 198). A proper lookout was maintained at all times on the *Otello*, since at least one licensed officer and one seaman were on the bridge at all times, and at least one man was on the bow during the period when the *Otello* was approaching the *Grand Grace* (R. 176).

Finding of Fact 16(i) disregards the uncontroverted fact that the *Otello* did use her engines to maneuver away from the *Grand Grace*.

Captain Sundlof, the Master of the *Otello*, testified (R. 207), that he was in fact moving with ahead power out of the anchorage and away from the *Grand Grace* before he was crowded by the *Jane Stove*.

"The Court: What application of power were you making at that time, Captain?

The Witness: We went slow ahead on starboard engine. And we were approaching *Antinous* all the time, came closer and closer to *Antinous*.

The Court: That is on account of your drift or drag?

The Witness: Also the speed.

The Court: Your drag?

The Witness: Yes, and the speed we made. We went slow ahead on starboard.

The Court: Proceed."

Chief Mate Sven J. Lindstrom described the reckless approach of the *Jane Stove* (R. 427):

"Q. Did you continue to watch her after that time? A. Yes, I did.

Q. What direction was she heading with relation to the bow of the *Otello*? A. Right straight in front of our bow.

Q. Where were you standing during this time when you watched the *Jane Store*? A. On the fore's'le.

Q. At this point that you have indicated with an X right at the bow, on Exhibit 1, that is? A. Yes.

Q. How close did the *Jane Store* pass in front of the point on the bow where you were standing? A. 20-25 meters."

The errors with respect to the *Grand Grace*.

The evidence of the *Grand Grace* shows that her officers admittedly observed the difficulties of the *Otello* for nearly an hour and made no effort to take measures which would have avoided a collision. The *Grand Grace* evidence shows that she made no effort to ready her engine for maneuvering during the fifty minutes that the *Otello* dragged toward her. (Finding of Fact 16(k) states the *Otello* was in difficulty for fifty minutes.) The evidence also shows that the *Grand Grace* made no effort to let out chain or to sheer away from the *Otello* by means of her rudder or engines (R. 837-838, 893, 1182-1183), although it is a well-recognized practice, and in fact was accomplished by a nearby ship, the *Antinous*.

The *Otello* was first observed to be dragging toward the *Grand Grace* at around 2:30 P. M. by the bridge watch of the *Grand Grace* (R. 1281) and was under constant observation by the *Grand Grace* until the collision occurred at 3:23 P. M. (Ex. 4D).

Lin Ping Knei who was acting as lookout on the *Grand Grace*, testified (R. 1281):

"Q. When were you first aware that the *Otello* was moving down towards your ship? A. I don't remember the exact time, but possibly—it is approximately around 2:30, but I cannot be exact.

Q. And did you continue to watch the *Otello* from that time? A. Yes, of course, I noticed them. They were coming towards us."

Captain Sha of the *Grand Grace* acknowledged that he observed the *Otello* dragging toward his vessel, and that a

perilous situation was developing. At the discovery depositions he drew a diagram, which graphically portrays how he observed the *Otello* slowly drag toward the *Grand Grace* (A p. 31). Sha stated (R. 837):

“Q. Now, Captain, when you saw this vessel in position No. 2 about ten minutes before the collision—that is correct, isn’t it, Captain? A. That’s right.

Q. From the time that you saw the vessel in that position No. 2, did you watch her all the time? A. I watch her all the time and I called attention to Captain Wang and the third mate.

Q. And they were on the bridge with you? A. They also were there. I say, ‘Watch that fellow. We may get trouble.’ ”

At page 841, Captain Sha states:

“Q. Captain, as the *Otello* moved from position 2 to 3 to 4, were you watching her constantly? A. Watching.

Q. Was the captain, the former captain, watching her constantly? A. Yes. All on the bridge watching.

Q. And the third mate also was watching? A. Yes.

Q. I suppose everyone was concentrating on her? A. Oh, yes, if any accident happen.

Q. Were you watching any other ships in the anchorage area at that time? A. No, all concentrating on that ship.”

Despite the fact that officers on the bridge of the *Grand Grace* were supposedly observing the approach of the *Otello* for nearly an hour, and recognized that there was danger of collision, no attempt was made to veer chain, use the rudder, or prepare the engines for maneuvering. Mr. Sha states at page 842 of the record:

“Q. Did you order any engine movements at all prior to the collision? A. Before?

Q. Before the collision. A. Before collision, no, the engines are not stand by.

Q. And you did not put them slow ahead or anything like that, before collision? A. No, no movement of engines.

Q. Did you let out any additional anchor chain before the collision? A. You mean the fairway anchor cable?

Q. In other words, you had five shackles out. Did you let any additional chain out? A. No, at no time.

Q. Were there people on your bow who could have let the anchor chain out? A. At that time, no people on the bow."

Capt. Sha at page 843:

"Q. Did you have a helmsman on duty before the collision? A. Yes, an A/B on duty.

Q. Was he in the wheelhouse? A. Yes.

Q. Did you give him any orders before the collision? A. No."

The neglectful inaction of the *Grand Grace* is clear when compared with the efforts of the American freighter *Antinous*, which was also anchored near the *Otello*. When the *Otello* began to drag, and approached the *Antinous*, her Master alertly maneuvered his engines and sheered his rudder so as to swing his anchored vessel clear of the *Otello*. Captain Pullen, Master of the *Antinous*, states at page 1647 as follows:

"A. Well, the only thing is that I felt very sorry. I was wondering what I could do to help her out, especially when she blew the danger signal, I thought she was blowing at me. And with the anchor down and so forth, and without me getting involved, I just thought I would swing over and give her as much room as my ship would swing without going ahead, so I gave her left rudder, and we gave her a few more revolutions I think probably, because at that time we were turning as much as twenty to give her a little rudder, to get her a little rudder power."

Knight's *Modern Seamanship*, 13 ed. p. 152, the accepted "Bible of Seamanship", is significant in this respect:

"If a vessel or other danger is seen drifting down upon you when lying at anchor or in a tide way,

by giving the ship a cant with the rudder, thus bringing the current on the bow, and bearing the chain roundly you may sheer well over across the tide and probably be clear of danger."

Neither Captain Sha nor the pilot of the *Grand Grace* were produced as witnesses at the trial or at the *de bene esse* depositions taken before the trial. We submit that such a failure to produce important witnesses gives rise to an unfavorable inference. See, for instance, *The New York*, 175 U. S. 187, 204 (1800); *The Georgetown*, 135 F. 854 (1905).

At the discovery depositions, Sha proved to be a most reluctant witness. Sha states at page 886:

"Q. Captain, I show you your vessel's chart, marked Exhibit 5. Is your first anchored position off Astoria marked on this chart? A. I answered already those questions. No more questions.

Q. Is your first position marked on the chart? A. No more answer for me today. You ask us before and this time too much nuisance.

Q. Captain, referring to this chart, what is the circle— A. No, I'm sorry. I am leaving."

A vessel at anchor which has an opportunity to take action to avoid collision must do so. If a vessel sees approaching danger, and has it in her power to avoid or to mitigate the accident and she fails to do so, she is at fault. In *The Sapphire*, 11 Wallace, 164, 171 (1870), the Supreme Court criticized an anchored ship for failure to take seasonable efforts to avoid collision with a drifting vessel. In that case the watch officer aboard the anchored vessel failed to pay out anchor chain, or take other steps to avoid collision, until it was too late. Mr. Justice Bradley stated at page 171:

"We cannot avoid the conviction that there was a want of proper care and negligence on the part of the officers of the *Euryale*, and that this contributed to produce the collision which ensued."

In the *West Cherow*, 276 Fed. 585, 589 (Eastern District of Virginia, 1921), an anchored vessel was held at fault

for failing to prepare her engines to manuever out of the way, when it became apparent that another vessel was dragging towards her. The court stated at page 589:

“There can be no excuse for the failure of the *West Cherow*, with a full head of steam on three boilers and everything in condition, to promptly direct the ship's movement.”

The *Ogemow*, 32 Fed. 919, 925 (Eastern District of Wisconsin, 1887) involved a collision between an anchored barge and tow under way. The barge was held at fault for failing to slack out more chain, or port the helm. Judge Dyer states at page 925:

“If her helm had been promptly put to port, and thus, by the force of the current, the stern of the vessel had been worked over to leeward and the bow turned off to starboard and if, in addition to this more anchor chain had been run out, thus allowing the vessel to drop down the stream with the current, and if all this had been done, as it might have been, before a collision was actually impending, it is highly probable the collision would have been avoided, or that the damages occasioned thereby would have been lessened.”

See also: *The Averly*, 58 Fed. 794 (S. D. N. Y. 1893); *The Bacchus*, 267 Fed. 468 (E. D. Va. 1920); *The Irishman*, 259 Fed. 301 (E. D. Va. 1919); *The Baltimore*, 283 Fed. 728 (1st Cir. 1922); *Wells v. Armstrong*, 29 Fed. 246 (S. D. N. Y. 1886); *Villain E. Fassie E Compagnia v. Tank Steamer E. W. Sinclair*; 207 F. Supp. 700 (S. D. N. Y. 1962) at p. 713, *aff'd*, 313 F. 2d 722, *cert. denied*, 373 U. S. 948.

The errors with respect to the *Jane Stove*.

The *Jane Stove*, which we contend interfered with the navigation of the *Otello*, had been maneuvering through the crowded anchorage for several hours prior to the collision, and had unsuccessfully tried to anchor on three occasions that day (R. 284-290). Her third erstwhile anchorage position had been about one-third of a mile astern of the *Grand Grace* (B p. 33).

At about the same time that the *Otello* began dragging her anchor, the *Jane Stove* noted that her own anchor was not holding, and commenced heaving up, and maneuvering down stream in the direction of the *Otello* and *Grand Grace* (R. 290-291).

As the *Jane Stove* approached these vessels, her pilot and captain observed that the *Otello* was heading at a 90 degree angle to the other vessels in the anchorage and was in obvious difficulty (R. 310-311, R. 1401). Nevertheless, the *Jane Stove's* pilot headed her directly across the *Otello's* bow, rather than to the north where there was more than ample room (R. 293-294). The *Jane Stove's* deep draft was 18 feet 7 inches (R. 1429) so that she had more than 500 yards of free water sufficiently deep to accommodate that draft to the north of the channel, in addition to the channel itself. As discussed earlier, it was the close approach of the *Jane Stove* on this hazardous course that prevented the *Otello* from keeping her engines going ahead, so that she could maneuver into open water, and compelled her instead to reverse her engines. According to witnesses aboard the *Otello*, the *Jane Stove* passed only about 50 to 70 feet off the bow of the *Otello* (R. 427).

The Trial Court very apparently overlooked the deposition testimony of the Master and Watch Officer of the *Jane Stove*. The Master admits that as he approached the *Otello*, she appeared to be dragging her anchor but that nevertheless his vessel continued across the bow of the *Otello*, passing only about 100 yards off. The Master further testified that as his vessel passed the *Otello*, he noted that the *Otello's* propeller was not turning, and that if it had been turning, and the *Otello* had been moving forward to clear across the bow of the *Grand Grace*, there would have been a dangerous situation between the *Jane Stove* and the *Otello*. Thus, this very important witness for the *Jane Stove* admitted the fact that the *Otello* held up on account of the *Jane Stove* (which ultimately resulted in a collision with the *Grand Grace*) and so avoided danger for the *Jane Stove*. In other words, the *Jane Stove* put herself in a position of danger and so hin-

dered the *Otello* as to cause the latter's collision with the *Grand Grace*.

Captain Christoffersen, Master of the *Jane Stove*, testified on page 1401:

“Q. Did it appear to you that the Swedish ship was drifting — A. Yes.

Q. —or dragging her anchor? A. Yes.”

* * * and on page 1403:

“Q. Were you watching the propeller of the Swedish ship with your glasses? A. Well, I was looking to see if it had any movements.

Q. Looking to see what? A. If it doing any movements with the propeller. But I'm quite sure I would have seen if it had start moving.

Q. Why were you looking at the propeller to see if it was moving? A. Because if he had been moving we could get into a danger.”

* * * and at page 1387:

“Q. How close were you to the Swedish ship as you passed her, how close was your ship? A. At least a hundred meters.

Q. And how close was the Swedish ship to the Chinese ship at that time? A. Well, that was very close to us when we passed it. It was not so far, any distance.”

This *de bene esse* testimony of the *Jane Stove* master flatly contradicts the testimony of the *Jane Stove's* pilot in significant respects. The pilot on the *Jane Stove* testified that after he discovered he was dragging his anchor, he picked up the anchor and proceeded downriver toward the *Grand Grace*, *Otello* and *Antinous* at full speed but that his ship was on a course well clear of the *Otello* and *Grand Grace*; that he was navigating in the prescribed ship channel, along the Astoria Range, well to the north of the colliding ships and presented no danger to them (R. 293-4).

But the Captain of the *Jane Stove*, who was on the bridge throughout this period with the pilot, plotted the course that

his vessel followed, and this clearly shows that at no time did the *Jane Stove* navigate along the Astoria Range and that, in fact, she navigated well south of the Astoria Range outside the regular channel between the *Otello*, drifting toward the *Grand Grace*, and the *Antinous* which was admittedly anchored south of the channel (App. B p. 33).

The pilot of the *Jane Stove* testified, self protectingly, that when he got under way from his third anchored position, allegedly directly astern of the *Antinous*, he proceeded down the main ship channel, along the Astoria Range (R., Quinn, p. 131, 289).

The anchored position of the *Jane Stove*, as plotted by her Master, flatly contradicts this self-serving testimony (App. B p. 33). This plot indicates that the *Jane Stove* did not anchor in the main ship channel dead astern of the *Antinous*. Rather, she anchored south of the channel, with the *Antinous* on her starboard bow, and the *Grand Grace* on her port bow. The Master of the *Jane Stove* testified at p. 1392:

“Q. Where was the *Grand Grace* in relation to your ship when you anchored the third time? A. I think we had him a little bit on the port side.

Q. A little bit on the port quarter? A. Port quarter, port bow.

Q. A little bit on the port bow? A. When we anchored the third time.

Q. Were you directly astern of the American cargo ship at that time? A. No. We had him a little bit on the starboard side, as far as I can remember.”

The *Jane Stove*'s watch officer on the bridge also testified that the American cargo ship (*Antinous*) was a little bit on his vessel's starboard bow as his vessel went down-river from her anchorage before the collision. R. pp. 1473-5.

“Q. And at any time while you were proceeding down river did you notice those red lights? A. Yes, I did see the red lights.

Q. And when you saw the red lights, was that before or after you passed the Swedish ship? A. I saw them both before and after.

Q. And when you saw them were they lined up so as to indicate that you were on the range? A. That I didn't notice.

Q. When you saw the red lights, the range lights, now, what was it that you saw? A. I saw two red lights.

Q. And what position were the two red lights in? A. I can't quite remember.

Q. Do you remember whether or not they were open?"

* * * * *

"Q. Do you recall whether the range lights were closed or whether they were open when you saw them? A. When we anchored the last time they were open.

Q. You turned around and came down river, is that right? A. Yes.

Q. Now, as you turned around and came down river, just after you turned and were coming down river did you see the American ship? A. Yes.

Q. You have testified about passing an American ship. You testified that, as you passed the Swedish ship, there was an American ship on your starboard bow. Was that a tanker? A. No.

Q. The tanker was a different ship, is that right? A. Yes.

Q. Where was the tanker? A. It was further up the river.

Q. Did you pass the tanker? A. Yes. We went around it.

Q. And then after you came around the tanker, did you then proceed down river? A. Yes.

Q. And as you proceeded down river, just after turning and passing the tanker, did you see the American Ship? A. Yes.

Q. How was she bearing from you at that time? Was she dead ahead or off your starboard bow or off your port bow, or where? A. Slightly on the starboard bow."

The *de bene esse* testimony given by the *Jane Stove's* own master and watch officer is confirmed by the deposition testimony given by the American cargo ship *Antinous*. This testimony directly confirms the fact that the *Jane*

Stove proceeded between the drifting *Otello* and the *Antinous*, and that the *Jane Stove* did not direct her course clear of obvious danger.

The chief mate of the *Antinous* testified as follows at pages 1734, 1735:

Q. One other thing I wanted to get before you left, you mentioned that the Swedish ship was in irons, that the Norwegian ship was down in the vicinity of these other two as the Swedish ship drifted toward the Liberty ship? A. In this general location here you are talking about (indicating)?

Q. Well, at that time when you mentioned "in irons", did you mean that the Norwegian ship was to some extent interfering with the ability of the Swedish ship to get out into the channel? A. When they got in the vicinity of the Liberty ship then I would say this ship coming downriver was moving at the same time.

Q. And so that the ship coming downriver, the Norwegian ship, was in the vicinity at the time that the Swedish ship was drifting down on the Liberty ship? A. That is right.

Chief Mate Boese states at pages 1709-1711:

Q. I think the evidence will bear out. Where was this ship, the *Jane Stove*, when you first saw it?

A. Well, she was—

Q. Just in words now, and I will give you an opportunity to draw a— A. When I first noticed it coming downriver she was—can I see the chart again there.

Q. Surely. A. I would say she was about abeam of this point, Tongue Point.

Q. Just off Tongue Point? A. Just off Tongue Point, because I was looking there at the time I saw her.

Q. In other words, she was upriver from you? A. She was upriver from us.

Q. She was off your stern, in other words? A. That's right.

Q. Do you know whether she was in the channel at that time? A. I do not know.

Q. Did she proceed toward you? A. She proceeded toward us downstream.

Q. And as she did so did she maintain a steady course or did she appear to change course? A. She had a steady course at the times I was watching her.

Q. She did not appear to change or alter course?

A. I didn't notice her alter course.

Q. As she approached you was she, would you say she was directly astern of you or was she to one side or the other? A. Well, I would say she was a little off of the port quarter. Looking from the bow.

Q. Little off the port quarter? A. Little off the port quarter.

Q. That is a little astern of you? A. Astern and off the——

Q. Port quarter? A. Yes. You could see it from the bow. I mean, if it had been directly behind the ship I couldn't have seen it from the bow there because of our ship.

Q. Did this ship, the *Jane Store*, pass your port beam? A. She passed our port beam.

Q. She did? A. She passed inside.

Q. What was the distance between your ship and the *Jane Store* when she passed your port beam? A. I don't recall the exact distance but a safe distance. I have no way of checking it.

Q. Do you recall where the Swedish ship was at the time the *Jane Store* passed your beam? A. She was down by the—as far as I could see she was down close to the Liberty.

Q. She was close to the Liberty? A. I don't know whether she had already collided at the the time or not. I do not know, but she was close to the Liberty. She was drifting down on the Liberty. Exact time she collided and so forth I do not recall.

The *Jane Store's* pilot was obviously attempting to place his vessel as far removed from the collision area as possible, to evade the charges that his reckless navigation interfered with the *Otello*, thereby bringing about the collision between the *Otello* and *Grand Grace*. However, the testimony of the *Jane Store* Master and of her watch officer and of the master of the *Antinous* clearly refute her pilot's story.

It is significant that the officers of the *Grand Grace* acknowledged that the *Otello* would probably have avoided collision with the *Grand Grace*, but for the fact that *Otello* first stopped her engines and then went astern as she drifted toward the *Grand Grace* (which engine maneuvers by *Otello* were necessitated by the crowding of the *Jane Stove*). Hao Wang of the *Grand Grace* testifies at page 1167 of the record:

“Q. He was coming down sort of sideways? A. Yes, gradually. I don’t know why. Like this. Either go this way, this way or come this way. He come very close to us. The engines stopped. Engines not moved; I saw this is very dangerous.

Q. When he was very close the engine was not moving? A. If the ship keep going maybe no trouble, maybe not hit our ship.

Q. In other words, if the *Otello* had gone ahead as she drifted down you think she could have passed safely astern of the Waterman ship? A. Yes; he have plenty of room. If he keep going he pass astern the Waterman ship.”

Captain Sha stated at page 837:

“Q. What happened from that time on? Did she continue to move towards you? A. No. Actually, she is shifting anchorage, and if she is going to fairway she would have been all right, I should think. But afterwards she stopped on our bow, like this, in this position (indicating).”

* * * and at page 840:

“Q. What did you think as she continued to remain in that same angle but came closer to you, broadside? A. Well, if she remains in this position?

Q. Yes. A. If she remains in this position (indicating)——

Q. That is No. 2 you are point to. A. We got trouble also, but she is moving in this position (indicating). She move quite fast, now slow.

Q. In a cross-channel direction? A. Going this way, so if she keeps going like that, you see, that still can clear our ship.

Q. You have just indicated a position 4 with red, that if she continued— A. If she continued that direction on the engines, she will be all clear of our ship.”

The evidence clearly portrays careless handling by the *Jane Stove*. Thus, the *Jane Stove*, using too much headway and under very unfavorable weather conditions, undertook to navigate through an anchorage area dangerously close to three vessels, one of which, the *Otello*, was drifting down on another (*Grand Grace*), and the drifting *Otello* had another vessel (*Antinous*) relatively close ahead. But, unbelievably, the *Jane Stove* headed between *Otello* and *Antinous*—a needless and heedless maneuver. Their respective relative positions which were observed by the *Jane Stove* presented an extraordinary situation, calling for the exercise of the greatest caution by the *Stove*. Nevertheless, she “barged” ahead needlessly and unheeding on a course between the *Otello* and the *Antinous*. Her actions plainly produced a situation for the *Otello* which placed the *Otello* “in irons”, so to speak, leaving her at the mercy of the wind and current, and prevented the *Otello* from taking the action which would have kept her clear of the *Grand Grace*.

It is, of course immaterial in assessing the liability of the *Jane Stove* that she was not in actual physical contact with either the *Otello* or the *Grand Grace*. Griffin on *Collision* states on page 504:

“A vessel which crowds another into collision with a third vessel, or which, by faulty navigation, brings about such an accident between other vessels is liable, even though she herself does not come into collision.”

In *Standard Oil Co. v. United States*, 82 F. Supp. 738 (S. D. N. Y. 1949), affirmed 174 F. 2d 182 (2nd Cir. 1949), the tanker *George W. Barnes* was traveling in a convoy on the port side of the SS. *George W. Lively*. This convoy was proceeding northbound. On the approach of a southbound convoy, the Commodore of the northbound convoy ordered his convoy to make an emergency 45 degree turn to

the right. The *Barnes* commenced execution of this course change, but the *Lively*, on her starboard side disobeyed the order and turned left towards the *Barnes*. The *Barnes* attempted to avoid collision with the *Lively*, and in so doing collided with the *Pan Virginia* in the southbound convoy. The court exonerated the *Barnes* and held the *Lively* and *Pan Virginia* liable for the collision.

In *The Susquehanna*, 134 Fed. 641, 646 (S. D. N. Y. 1905), the steamer *Susquehanna* was held at fault for crowding the steamer *Princeton* into a collision with a third vessel. The court stated at page 646:

“These views lead to the conclusion that the *Susquehanna* brought the *Princeton* in peril of collision, and that to extricate herself the *Princeton* must back. If in going astern the *Princeton*, using such caution as the exigencies of the case and the excitement of the movement permitted, collided with another vessel, the *Susquehanna's* negligence would be the proximate cause. It would be like a person springing out of the way of a negligently driven wagon and striking another object (*Coulter v. A. M. U. Express Co.*, 56 N. Y. 585), or a passenger jumping from a train, negligently brought into danger, (*Dyer v. Erie R. Co.*, 71 N. Y. 228). Such cases are numerous.”

Further, the *Jane Stove* was proceeding at an excessive speed through an anchorage area. *Griffin on Collision* commented on such practice as follows at page 350:

“If the moving vessel passes over anchorage grounds, at least in the absence of some peculiar necessity, she takes the risk of doing so and must use extreme care though such navigation is not per se unlawful * * *.”

So, the misconduct of the *Jane Stove* charges her with liability for the *Otello's* forced collision with the *Grand Grace*. In turn, the *Grand Grace* is in equal fault with the *Jane Stove* in that the *Grand Grace* failed to take any measures open to her which would have avoided the plainly threatened collision.

POINT III.

The trial court's erroneous determination of negligence is a conclusion of law reviewable on appeal.

This case involves the simple question of whether the facts demonstrate negligence on the part of any or all of the vessels named as parties. Determinations of negligence in admiralty are reviewable. This is so, since an appellate court cannot determine whether the correct standard of due care has been applied to the facts of the case where, as here, the standard is not discussed and the facts relative to the standard are not expressly resolved. In *Kane v. Branch Motor Express Co.*, 290 F. 2d 503, 506 (2d Cir. 1961), the Court said, at p. 506:

"When a judge sitting without a jury passes on the issue of negligence, his conclusion is freely reviewable on appeal and is not to be tested by the 'clearly erroneous' standard of Rule 52(a), F. R. Civ. P., 28 U. S. C. A. *Romero v. Garcia & Diaz Inc.*, 2 Cir., 1961, 286 F. 2d 347, 355, certiorari denied 81 S. Ct. 905, and authorities there cited. This is because a Court of Appeals cannot determine, when there has been no charge to the jury, whether the correct standard of due care has been applied to the facts of the case. This principle is, of course, equally applicable whether the trial judge finds negligence or whether he exonerates the defendant. In either case, the Court of Appeals must decide whether the finding can stand if tested by a properly formulated standard of care."

In *Romero v. Garcia & Diaz, Inc.*, 286 F. 2d 347, 355 (2nd Cir. 1961), *cert. denied*, 365 U. S. 869, Judge Friendly writing for a unanimous Second Circuit decision said at p. 355:

"Many decisions in this circuit, some in civil actions and others in admiralty, have held that a judge's determination of negligence as distinguished from the evidentiary facts leading to it is a conclusion of law freely reviewable on appeal and not a finding of fact entitled to the benefit of the 'also clearly erroneous rule' (cases cited)."

POINT IV.

The court erred in allowing litigation expenses (specification of error 9 above).

In its final decree, the trial court made the following awards:

“2. Grace Navigation Corporation shall have and recover from and against the *M. V. Otello* and Rederiaktieholaget Soya and the guarantors on its letter of undertaking for release of the *M. V. Otello* the sum of Thirty Eight Thousand Dollars (\$38,000.00)* plus \$1,884.84 interest thereon to and including July 19, 1965, plus \$1,795.12 litigation expenses, amounting to a total of \$41,679.96, together with taxable costs in the amount of \$112.50 with interest at 6 per cent per annum on said total sum from the date of this decree until paid.

“3. Lorentzens Skibs A/S as owner of the *Jane Store* shall have and recover from and against the *M. V. Otello* and Rederiaktieholaget Soya and the guarantors on its letter of undertaking for release of the *M. V. Otello* the sum of \$2,409.89 expenses of litigation and together with taxable costs in the amount of \$, with interest thereon at 6 per cent per annum from date of this decree until paid.”

We submit that allowance of these “litigation expenses” is unsupportable.

The so-called “litigation expenses” consist, among other things, of non-taxable long distance telephone expenses, surveys of damage to the *Grand Grace*, and witnesses’ expenses (R. 112, 113, 120, 121). While the awarding of costs is within the discretion of the trial court, this discretion does not permit the award of non-statutory expenses and unrecognized disbursements. This circuit has consistently held that an appellate court, in passing on the merits of a case, may, upon proper assignment of error,

* Damages as stipulated by the parties.

correct a departure from settled principle in the disposition of costs. *The Lily*, 69 F. 2d 898 (9th Cir. 1934); *The Lurline*, 73 F. 2d 808 (9th Cir. 1935).

Conclusion.

We submit that the evidence and the applicable law in this case clearly indicate that the negligent actions of the *Jane Stove*, combined with the negligent inaction of the *Grand Grace* were the sole causes of the collision between the *Otello* and the *Grand Grace*. Furthermore, it is not negligence *per se* for a vessel such as the *Otello* to drag her anchor. The *Otello* acted reasonably under unexpectedly adverse conditions, and would never have come into collision with the *Grand Grace*, but for the combined negligence of the *Grand Grace* and *Jane Stove*.

The decree below should be reversed to adjudge respondent-appellees Grace Navigation Corporation and the SS. *Grand Grace*, and Lorentzens Skibs A/B and the M/V *Jane Stove* in fault and liability, with costs below and of this appeal, awarded to libelant-appellant Rederi A/B Soya.

Respectfully submitted,

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Dated, March 31, 1966.

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID C. WOOD

Appendix A.**Diagram**

(*Opposite* )

290°

Farmway

1. mile

1.

wind



OTELLO

2.

3

OTELLO

4. 3 slips 2.3"

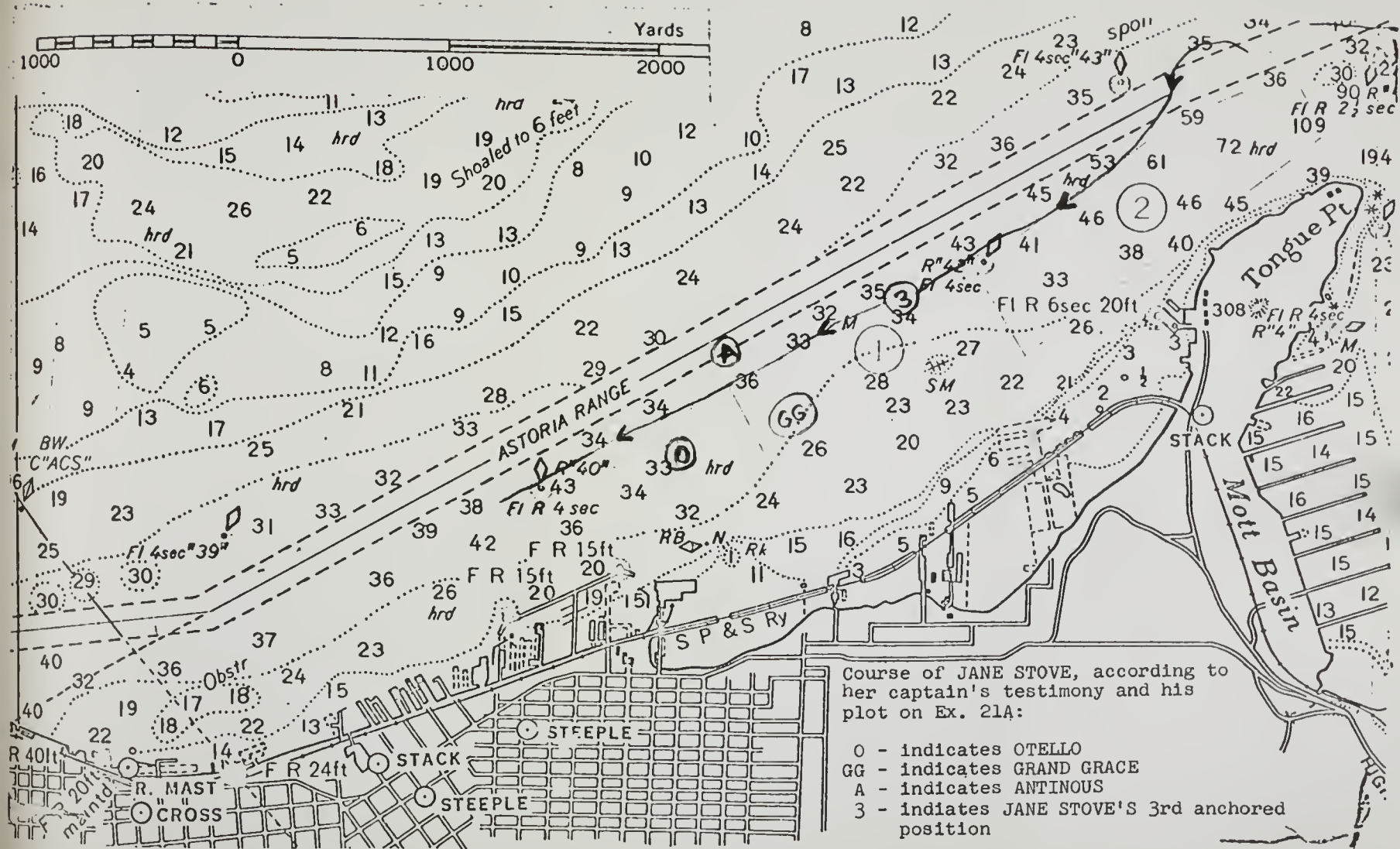
4

Grand

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Appendix B.**Diagram***(Opposite )*



Course of JANE STOVE, according to her captain's testimony and his plot on Ex. 21A:

- 0 - indicates OTELLO
GG - indicates GRAND GRACE
A - indicates ANTINOUS
3 - indicates JANE STOVE'S 3rd anchored position

